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No. 1

Supreme Court, U.S.
FILED

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APPENDIX AND BRIEFS

In The

Supreme Court of the United States

AMERIQUEST MORTGAGE SECURITIES, INC.,

Petitioner,

v.

SARAH HAMM and SHIRLEY JONES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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LAW PRINTING

QUESTIONS PRESENTED

1. Does the Truth In Lending Act ("TILA"), 15 U.S.C. §§ 1640 et seq., require "hypertechnicality" in a lender's disclosure statement notifying the borrower of the material terms of a loan transaction, or is the proper standard "meaningful disclosure" made in a clear and conspicuous manner?

2. Should certiorari be granted to resolve the conflict of decisions among the Courts of Appeals created by the Seventh Circuit's decision interpreting the disclosure requirements of TILA?

LIST OF PARTIES

Plaintiffs and Respondents: Sarah Hamm and Shirley Jones

Defendant and Petitioner: Ameriquest Mortgage Securities, Inc.

Defendants: Ameriquest Mortgage Company and AMC Mortgage Services, Inc.

RULE 29.6 STATEMENT

Ameriquest Mortgage Securities, Inc. is a wholly-owned subsidiary of Ameriquest Mortgage Company, which in turn is a wholly-owned subsidiary of ACC Capital Holdings Corporation, which in turn is a wholly-owned subsidiary of Ameriquest Capital Corporation (which changed its name on January 2, 2008 to "SBP Capital Corporation").

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PETITION FOR WRIT OF CERTIORARI

Ameriquest Mortgage Securities, Inc respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

In *Hamm*, the district court granted Ameriquest's motion for summary judgment in an unpublished memorandum opinion, which is reprinted at Appendix (App.) 16. In *Jones*, the district court granted plaintiff's motion for summary judgment in an unpublished memorandum opinion and order, which is reprinted at App. 26.

The opinion of the Seventh Circuit was filed on October 17, 2007, and is published at 506 F.3d 525; the opinion is also reprinted at App. 1.

JURISDICTION

This court has jurisdiction under 28 U.S.C. § 1254(1). This petition has been filed within 90 days of the filing of the Seventh Circuit's opinion.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

15 U.S.C. § 1601(a) provides:

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers.

It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

15 U.S.C. § 1638(a)(6) provides:

(a) *Required disclosures by creditor*

For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable: . . .

(6) The number, amount, and due dates or period of payments scheduled to repay the total of payments.

12 C.F.R. § 226.18(g) provides:

Content of disclosures. For each transaction, the creditor shall disclose the following information as applicable: . . .

(g) *Payment schedule.* The number, amounts, and timing of payments scheduled to repay the obligation.

(1) In a demand obligation with no alternate maturity date, the creditor may comply with this paragraph by disclosing the due dates or payment periods of any scheduled interest payments for the first year.

(2) In a transaction in which a series of payments varies because a finance charge is applied to the unpaid principal balance, the creditor may comply with this paragraph by disclosing the following information:

(i) The dollar amounts of the largest and smallest payments in the series.

(ii) A reference to the variations in the other payments in the series.

The relevant Federal Reserve Board commentary to 12 C.F.R. § 226.18(g) states:

4. *Timing of payments.*

i. *General rule.*

Section 226.18(g) requires creditors to disclose the timing of payments. To meet this requirement, creditors may list all of the payment due dates. They also have the option of specifying the "period of payments" scheduled to repay the obligation. As a general rule, creditors that choose this option must disclose the payment intervals or frequency, such as "monthly" or "bi-weekly," and the calendar date that the beginning payment is due. For example, a creditor may disclose that payments are due "monthly beginning on July 1, 1998." This information, when combined with the number of payments, is necessary to define the repayment period and enable a consumer to determine all of the payment due dates."

12 C.F.R. § 226.23(a)(3) provides:

The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

INTRODUCTION

This case concerns disclosures under the Truth in Lending Act (TILA). If a court finds that a creditor fails to use language constituting proper disclosure, the borrower's right to rescind the loan transaction is extended from three business days to up to three years.

When amendments to TILA were being debated, one Senator stated that the "threat of wholesale rescissions present[s] a real danger to our modern system of home financing." According to this Senator, the amendments were "intended to curtail the devastating liability that threaten[s] our housing finance system." Such liability would result from the onslaught of suits demanding "the most draconian remedy available under Truth in Lending – rescission." Another Senator stated providing higher tolerance levels for minor violations was "critical to avert what could be a financial disaster in the mortgage industry."

The year was 1995.[1]

The amendments discussed above became law 12 years ago. Unfortunately, not all courts have construed TILA consistent with congressional intent. The present case is a glaring example. The disclosure statements in this matter identified the due date of

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[1] All but the first statement were made by Senator D'Amato; the last was made by Senator Mack. *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 424 (1st Cir. 2007) (quoting 141 Cong. Rec. S14566-S14568).

the first home loan payment, the due date of the last payment, and the number of payments in between: a total of 360 payments. Both plaintiffs admitted they knew their payments were due monthly; however, they argued that the disclosure statements violated TILA because the statements failed to contain the word "monthly." The Seventh Circuit held that, "when it comes to TILA, 'hypertechnicality reigns,'" and that its decision "on the adequacy of Ameriquest's disclosure of the payment period depends on just how picky we think the statute is." App. 9. The Seventh Circuit held that a borrower should not be required to assume that 360 payments over a 360-month period means monthly payments. App. 11.

As the Seventh Circuit's opinion recognizes, its "hypertechnical" construction of TILA "is not . . . the formulation that some of our sister circuits use." App. 9. Certiorari is necessary to resolve this conflict and articulate a proper standard for disclosure statements consistent with TILA and related regulations.

STATEMENT OF THE CASE

1. Hamm's Loan Transaction.

Sarah Hamm is a consumer with a history of credit transactions. App. 51-52. Hamm previously held a position as a financial advisor with Met Life. App. 52.

In January 2002, Hamm entered into a loan transaction secured by a mortgage with Ameriquest. App. 4.[2] During the loan closing, Hamm signed a "Disclosure Statement," which indicated a first payment due date of March 1, 2002, and a last payment due date of February 1, 2032. The Disclosure Statement disclosed 360 payments during a 360-month period:

NUMBER OF PAYMENTS	AMOUNT OF PAYMENTS	PAYMENTS ARE DUE BEGINNING
359	$541.92	03/01/2002
1	$536.01	02/01/2032

App. 5.

During her deposition, Hamm admitted she understood both before and after closing that her Ameriquest loan required monthly payments. App. 51. Her understanding resulted in part from the numerous other documents she signed that indicated her payments would be due monthly. For example,

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[2] The loans to both Hamm and Jones were made by defendant Ameriquest Mortgage Corporation. After the transactions were complete, Ameriquest Mortgage Corporation sold the mortgages to petitioner Ameriquest Mortgage Securities, Inc.; the loans were both serviced by defendant AMC Mortgage Services, Inc. App. 5. The Seventh Circuit held that summary judgment in favor of Ameriquest Mortgage Company and AMC Mortgage Services was proper. App. 15.

her adjustable rate note stated "I will pay principal and interest by making payments every month." App. 50-51. Likewise, Hamm read the adjustable rate rider at her loan closing, which included a section entitled "Interest Rate and Monthly Payment Changes." App. 51.

2. Jones's Loan Transaction.

Jones is likewise a consumer with a history of credit transactions, including a prior mortgage. App. 56.

In March 2002, Jones entered into a loan transaction secured by a mortgage with Ameriquest. App. 32. Prior to entering into this loan transaction, Jones determined how much she could afford to pay based on her monthly income. App. 57.

Like Hamm, Jones signed a Disclosure Form that, other than the due dates, was identical to that quoted above: The statement disclosed 360 payments during a 360-month period. See App. 5.

During her deposition, Jones admitted she understood that her Ameriquest loan required monthly payments. App. 55-56. Finally, and again like Hamm, Jones signed numerous other documents that disclosed her payment amount and the fact that it was due monthly. App. 53-55.

3. The Lawsuits and the Conflicting District Court Rulings.

Hamm and Jones filed separate lawsuits in federal court in the Northern District of Illinois. They alleged that Ameriquest violated TILA by failing to explicitly state the payment period in the TILA Disclosure Statement. In *Hamm*, the district court granted Ameriquest's motion for summary judgment, while in *Jones* the court denied Ameriquest's motion and granted Jones's motion.[3] Both losing parties appealed to the Seventh Circuit, which consolidated the two matters.

4. The Seventh Circuit's Opinion.

In a published opinion (506 F.3d 525), the Seventh Circuit held that "when it comes to TILA, hypertechnicality reigns. . . . Our decision on the adequacy of Ameriquest's disclosure of the payment

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[3] Hamm and Jones also asserted that Ameriquest's inclusion of a one-week rescission right notice alongside the TILA-mandated three-day rescission right notice violated TILA because it could cause borrowers to unknowingly give up their rescission rights. In *Hamm*, the district court found no TILA violation and Hamm did not appeal from the notice issue. In *Jones*, the district court granted summary judgment to Jones based on Ameriquest's ostensible failure properly to state the "monthly" payment period; it denied both Jones's and Ameriquest's summary judgment motions on the argument relating to the sufficiency of the lender's notice of a right to rescind. The Seventh Circuit deemed it unnecessary to resolve the "rescission notice" issue, having found another defect. App. 4.

period depends on just how picky we think the statute is." App. 9. The court acknowledged that "many (or most) borrowers would understand that a mortgage with 360 payments due over approximately 30 years contemplates a payment by the borrower each month during those 30 years." App. 10. Nonetheless, because Ameriquest's disclosure did not explicitly state that payments were due monthly, the court held that the disclosure violated TILA and that plaintiffs could rescind their contracts. App. 11-12. The court recognized that its hypertechnical approach conflicted with "the formulation that some of our sister circuits use." App. 9, citing *Santos-Rodriguez v. Doral Mortgage Corp.*, 485 F.3d 12, 17 n. 6 (1st Cir. 2007).

That candid assessment of the conflict created by the Seventh Circuit's hypertechnical approach perhaps does not go far enough, however; as most circuits – including the First, Third, Fifth, Sixth and Eleventh – have consistently construed Congress's intent when enacting TILA and more recent amendments as requiring "meaningful disclosure" which "clearly and conspicuously" notifies the borrower of his or her rights in light of the particular circumstances of the transaction. The majority of federal and state courts reject any notion of hypertechnicality. The Seventh Circuit's approach is inconsistent with plain meaning of TILA and will have predictably undesirable and unintended consequences for national lending markets if allowed to stand.

REASONS WHY THE PETITION SHOULD BE GRANTED

I.

The Seventh Circuit's Opinion Creates a Conflict Among the Circuits.

The Truth In Lending Act (TILA) requires a creditor in a consumer credit transaction to disclose "the number, amount, and due dates or period of payments scheduled to repay the total of payments." 15 U.S.C. § 1638(a)(6). Regulation Z, which implements TILA and is promulgated by the Federal Reserve Board, requires the creditor to disclose "the number, amounts, and timing of payments scheduled to repay the obligation." 12 C.F.R. § 226.18(g). If the creditor fails to comply with these requirements, the borrower's right to rescind is extended for up to three years. 12 C.F.R. § 226.23(a)(3).

The disclosure statements at issue here identified 359 payments in a set amount, beginning on a set day in 2002, and one payment in a different amount on a date in 2032. In both cases, the period between the 2002 date and the 2032 date was exactly 360 months. During this 360-month period, the disclosure statements identified that 360 payments were due.

Nonetheless, the Seventh Circuit held the disclosure statements violated TILA because an "ordinary borrower" would not understand that payments would be due monthly. The Seventh Circuit acknowledged that the finding of a "violation" rested on a hypertechnical interpretation of the statute. But

more importantly (at least at this juncture), the court recognized that its approach differed from that of other circuits. Certiorari is necessary to resolve this split of authority.

For example, just a few months earlier in *Santos-Rodriguez v. Doral Mortgage Corp.*, *supra*, 485 F.3d 12 (1st Cir. 2007), the First Circuit held: "We do not follow the Seventh Circuit's view that 'TILA does not easily forgive "technical" errors.'" *Id.* at 17 n. 6. At issue in *Santos* was the notice concerning plaintiffs' right to rescind a refinancing loan, which stated: "You are entering into a transaction that will result in a mortgage . . . on your home. You have a legal right under federal law to cancel this transaction, without cost, within three business days. . . . [¶] If you cancel the transaction, the mortgage, lien or security interest is also cancelled." Plaintiffs argued the form they received failed to disclose that if their refinancing loan was rescinded, the original loan was not cancelled. *Id.* at 16. The First Circuit found the notice sufficient because, under TILA, only "clear and conspicuous" notice is required, not "perfect" notice:

> "[I]t is true that the disclosure statement plaintiffs received did not affirmatively inform them . . . that rescission of the refinance transaction would not also rescind their original mortgage. However, we do not require perfect disclosure. The question before us is not whether [another] notification . . . would have been more complete than the notification plaintiffs actually received, but only whether the notification plaintiffs

> actually received met the requirements of the clear and conspicuous standard laid out in Regulation Z. Evaluating, as we must, Doral's disclosure from the vantage point of the hypothetical average consumer [citation], we conclude that because plaintiffs were told, clearly and conspicuously, that rescission would only operate as to their pending refinance transaction, any conclusions that they might have drawn from that disclosure about their previously existing mortgages were unreasonable (and, thus, not a valid basis for any TILA claim)."

Id. at 18 (fns. omitted); accord, *McKenna v. First Horizon Home Loan Corp.*, *supra,* 475 F.3d 418, 424 (1st Cir. 2007) (lenders should not "be made to face overwhelming liability for relatively minor violations").

The Eleventh Circuit took a similar approach ten years ago in *Smith v. Highland Bank*, 108 F.3d 1325 (11th Cir. 1997). In *Smith*, the borrower received a notice of her three-day right to rescind. Along with the notice, she was required to sign an "acknowledgment of receipt" that the lender had complied with TILA. On the same page as the acknowledgment was a "Certificate of Confirmation," which the borrower was to sign after the three-day rescission period had expired. Below the Certificate was a note stating that "[a]ll parties who execute Acknowledgment of Receipt must execute Certificate of Confirmation." The borrower argued that this statement, taken together with the placement of the Certificate of Confirmation

on the same page as the acknowledgment of receipt, would lead the average consumer to believe that she had to sign the Certificate when she received the notice of her right to rescind, i.e., before the three-day rescission period even started.

The Eleventh Circuit held that the lender's notice was sufficient. The court cited amendments to TILA in 1995 that evinced Congress's rejection of a hypertechnical view of the statute. Congress was concerned that courts were "allow[ing] plaintiffs to rescind a mortgage as a result of minor TILA violations." *Smith, supra,* 108 F.3d at 1327 and n. 4. The court also cited the legislative history to the amendments, which recognized that the housing market would be adversely affected if minor technical TILA violations were upheld. *Id.*[4]

On facts similar to the present case, the Eleventh Circuit dismissed a rescission claim in which the borrowers alleged technical "violations" of TILA based upon the form of the right to rescind notice and a typographical error regarding the number of monthly payments. *Veale v. Citibank, F.S.B.,* 85 F.3d 577 (11th

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[4] The *Smith* court quoted 141 Cong. Rec. H9513, H9514 (daily ed. Sept. 27, 1995) (statement of Rep. Leach) ("The problem is that an honest mistake of no consequence to any of the parties involved has become the subject of shark instincts of the plaintiff's bar") and 141 Cong. Rec. S5614, S5614 (daily ed. Apr. 24, 1995) (statement of Sen. Mack) ("These laws encourage cookie-cutter lending in order to avoid mistakes. Consumers are then hurt by higher rates and less lending").

Cir. 1996), *cert. denied,* 520 U.S. 1198 (1997). The *Veale* court held that these defects were immaterial and did not justify rescinding plaintiffs' home loan. *Id.* at 580-581; accord, *Barrett v. Bank One, N.A.*, 511 F.Supp.2d 836, 841 (E.D. Ky. 2007) (holding, less than a month before the decision in this case, that "[t]he Sixth Circuit addressed a substantially similar issue" under TILA and opted for the First and Eleventh Circuit's "clear and conspicuous" standard).

The Fifth Circuit likewise concluded many years ago that TILA should not be interpreted in a hypertechnical fashion. See, e.g., *Smith v. Chapman*, 614 F.2d 968, 972 (5th Cir. 1980) ("Strict compliance does not necessarily mean punctilious compliance if, with minor deviations from the language described in the Act, there is still a substantial, clear disclosure of the fact or information demanded by the applicable statute or regulation."). Likewise, the Third Circuit has recognized that TILA "does not require an ideal notice . . . , just a clear, accurate, and conspicuous one." *In re Porter*, 961 F.2d 1066, 1076 (3d Cir. 1992).[5]

Contrary to these many authorities, the Seventh Circuit believes that only perfect notices will withstand scrutiny under TILA. Under such a formulation, loan transactions throughout the nation will be

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[5] Application of the clear and conspicuous standard in *Porter* resulted in judgment for the borrower because the notices in question were subject to two interpretations having different legal implications. 961 F.2d at 1077.

subject to extended rescission periods even though no one was harmed by the alleged statutory transgression; indeed, both borrowers in these consolidated appeals knew their payments were due monthly. Even the Seventh Circuit did not "doubt that many (or most) borrowers would understand that a mortgage with 360 payments due over approximately 30 years contemplates a payment by the borrower each month during those 30 years." App. 10. TILA is ill-served by such hypertechnicality.

II.

The Seventh Circuit's Opinion is Inconsistent With Congress's Explicit Intention That TILA Should Not Be Applied in a Hypertechnical Manner

There is little doubt that Ameriquest's notices to Hamm and Jones in this case would have been upheld by most (if not all) other circuits.[6] The Seventh Circuit's hypertechnical application of TILA – imposing a standard of "perfection" in the form and content of TILA disclosures – cannot be reconciled with Congress's intent.

For reasons apparent in the 1995 amendments of TILA, most courts have concluded that TILA's clear

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[6] State courts have likewise eschewed a hypertechnical approach. *Associates Home Equity Services, Inc. v. Troup*, 343 N.J. Super. 254, 281, 778 A.2d 529, 545 (2001); *ContiMortgage Corp. v. Delawder*, 2001 Ohio App. Lexis 3410 (Ohio App. 2001).

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and conspicuous standard is less demanding than a requirement of "perfect" notice. *Santos-Rodriguez*, *supra*, 485 F.3d at 16-17, citing *Veale v. Citibank*, *supra*, 85 F.3d at 580 ("TILA does not require perfect notice; rather it requires a clear and conspicuous notice of rescission rights"); *Smith*, *supra*, 614 F.2d at 972 ("Strict compliance does not necessarily mean punctilious compliance if, with minor deviations from the language described in the Act, there is still a substantial, clear disclosure of the fact or information demanded by the applicable statute or regulation"); *Dixon v. D.H. Holmes Co.*, 566 F.2d 571, 573 (5th Cir. 1978) ("The question is not whether [notice provided under the TILA] is capable of semantic improvement but whether it contains a substantial and accurate disclosure").

This Court has endorsed such an interpretation. In *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, this Court held: "The concept of 'meaningful disclosure' that animates TILA [citation] cannot be applied in the abstract. *Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure . . . and the need to avoid . . . [information overload].'") *Id.* at 568 (quoting S. Rep. 96-73, p. 3 (1979)).

The 1995 TILA amendments (*see* Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271, 272-273), were intended by Congress to "provide higher tolerance levels for what it viewed as honest mistakes in carrying out disclosure

obligations." *McKenna, supra*, 475 F.3d at 424. In taking this step, Congress made manifest that although it had designed TILA to protect consumers, it had not intended that lenders would be made to face overwhelming liability for relatively minor violations. A key proponent of the legislation expressed an awareness, acknowledged by others during the floor debate, that the "'threat of wholesale rescissions present[s] a real danger to our modern system of home financing.'" *Id.* at 424 (quoting 141 Cong. Rec. S14566, S14567, statement of Sen. D'Amato). The amendments, Senator D'Amato stated, were specifically "'intended to curtail the devastating liability that threaten[s] our housing finance system.'" *Id.* The senator attributed that prospect – "devastating liability" – to the onslaught of suits demanding "'the most draconian remedy available under Truth in Lending – rescission.'" *Id.* Viewed against this backdrop, it becomes readily evident that providing higher tolerance levels for minor violations was "'critical to avert[ing] what could [have] be[en] a financial disaster in the mortgage industry.'" 475 F.3d at 424 (quoting 141 Cong. Rec. S14566, S14568, statement of Sen. Mack).

Averting "financial disaster in the mortgage industry," as unequivocally expressed over a dozen years ago when Congress enacted the 1995 amendments of TILA, still compellingly argues against the imposition of the hypertechnical standard adopted by the Seventh Circuit. *See generally Santos-Rodriguez, supra*, 485 F.3d at 16-17; *Veale v. Citibank, supra*, 85

F.3d at 580-581; *Barrett v. Bank One*, *supra*, 511 F.Supp.2d at 841. Certiorari is necessary to resolve this conflict between the circuits consistent with the plain meaning and explicit intent of TILA's disclosure requirements.

CONCLUSION

The Seventh Circuit has created a clear split among the Courts of Appeals. Its "hypertechnical" interpretation of the disclosure requirements of TILA is inconsistent with Congress's intent as construed by this Court and a majority of other circuits. For either or both of these reasons, this petition should be granted.

Respectfully submitted,

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In the
United States Court of Appeals
for the Seventh Circuit

No. 05-3984

SARAH HAMM,

Plaintiff-Appellant,

v.

AMERIQUEST MORTGAGE COMPANY,
AMERIQUEST MORTGAGE SECURITIES,
INC., AND AMC MORTGAGE SERVICES, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 05 C 227 – **Samuel Der-Yeghiayan**, *Judge*.

No. 06-3086

SHIRLEY JONES,

Plaintiff-Appellee,

v.

AMERIQUEST MORTGAGE COMPANY,
AMERIQUEST MORTGAGE SECURITIES,
INC., AND AMC MORTGAGE SERVICES, INC.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 05 C 432 – **David H. Coar**, *Judge*.

ARGUED APRIL 13, 2007 – DECIDED OCTOBER 17, 2007

Before FLAUM, MANION, and WOOD, *Circuit Judges*.

WOOD, *Circuit Judge*. Plaintiffs Sarah Hamm and Shirley Jones sued defendants Ameriquest Mortgage Company ("Ameriquest"), Ameriquest Mortgage Securities, Inc., and AMC Mortgage Services, Inc., in separate actions brought under the Truth In Lending Act ("TILA"), 15 U.S.C. § 1640. Each of them claimed that Ameriquest, the original lender, violated TILA by failing to state explicitly the payment period in the borrowers' TILA Disclosure Statements. In addition, each asserted that Ameriquest's inclusion of a one-week rescission right notice alongside the TILA-mandated three-day rescission right notice violated TILA because it could cause borrowers unknowingly to give up their TILA rescission rights. As remedies, they claimed both damages and the right to rescind their mortgages.

The two suits, though identical from a legal standpoint, wound up before different district court judges; those judges reached opposite results. In the Hamm action, the district court granted summary

judgment to the defendants on both claims; Hamm appeals based only on the theory of liability relating to the payment period. In the Jones action, the district court granted summary judgment to Jones based on Ameriquest's failure properly to state the payment period; it denied both Jones's and Ameriquest's summary judgment motions on the argument relating to the notice of a right to rescind, concluding that material issues of fact remained on that claim.

On the surface, it would appear that the Jones action is not yet resolved in the district court. However, we have held that,

> once [a district court has] entered a judgment giving the plaintiff all the relief that it was seeking, the plaintiff's remaining ground merged in the judgment, which ended the case in the district court and therefore was appealable without the aid of Rule 54(b), even though, should such a judgment be reversed on appeal, the lawsuit would not be over, because the plaintiff had an alternative theory of liability.

Indiana H.B. R.R. Co. v. American Cyanamid Co., 916 F.2d 1174, 1183 (7th Cir. 1990). In short, a plaintiff can win only once, and so it does not matter how many other theories are left on the table if the claim itself has been resolved. The judgment of the district court, which is what we review, is final in Jones's case and thus ripe for appeal. Before this court, the defendants have addressed both theories of liability, while Jones argues that her allegation of defective notice of

the right to rescind provides an alternative basis for affirming the district court's grant of summary judgment in her favor.

We conclude that the district court in the Jones action reached the correct result on the payment period theory of liability. That is enough to require reversal in Hamm's case and affirmance in Jones's case. We do not reach the issue concerning the notice of the right to rescind.

I

The facts in these two cases are not in dispute, and so we review them here only briefly. On January 19, 2002, Hamm entered into a loan transaction secured by a mortgage with Ameriquest. On March 13, 2002, Jones did the same thing. At closing, Hamm and Jones each signed a form entitled "Disclosure Statement" that listed a specific date as the due date for the first payment and another specific date for the final payment.

Neither Disclosure Statement ever says, in so many words, that payments will be made over a 360-month period of time. Instead, the relevant part of the forms looked like this (using Hamm's as the example):

NUMBER OF PAYMENTS	AMOUNT OF PAYMENTS	PAYMENTS ARE DUE BEGINNING
359	$541.92	03/01/2002
1	$536.01	02/01/2032

Elsewhere on the form it indicates the "Total of Payments," which in Hamm's case was $195,085.29 and in Jones's case was $172,766.38. At no place on either Disclosure Statement does the number "360" appear, nor is there any reference to "360 months," nor an indication that payments are to be made monthly. On the other hand, it does not take much calculation to realize that the time between the first entry in the third column and the last entry is just shy of thirty years, or 360 months. Both Hamm and Jones signed other documents that said things like "loan payments are required monthly" or that at least used the term "monthly" when referring generally to the required payments.

At their loan closings, Hamm and Jones also each received copies of a "Notice to Cancel" form and a "One Week Cancellation" form. The "Notice to Cancel" form states that TILA allows three days for a borrower to cancel a loan. The "One Week Cancellation" form informs the borrower that Ameriquest gives her a right to cancel for a full week. After the transactions were complete, Ameriquest Mortgage Company sold the mortgages to defendant Ameriquest Mortgage Securities; they are both serviced by defendant AMC Mortgage Services.

In the Jones action, the district court entered judgment against only defendant Ameriquest Mortgage Securities, Inc., after concluding that Jones filed her suit after the statutory deadline for relief other than rescission. It dismissed the case as moot against the other two defendants. It also ordered Ameriquest to pay Jones's attorneys' fees and other costs. In the Hamm case, as we noted earlier, the district court entered judgment for Ameriquest.

II

A

We begin with the plaintiffs' complaint that the Disclosure Statements did not explicitly state the payment period of their loans, as required by TILA. We review a decision to grant summary judgment *de novo*. *Conn. Indem. Co. v. DER Travel Serv., Inc.*, 328 F.3d 347, 349 (7th Cir. 2003). In conducting our review, we look to the language of the statute, the implementing regulation ("Regulation Z," promulgated by Federal Reserve Board ("FRB")), and the relevant FRB Staff Commentary. TILA was written to serve more than each individual borrower's needs. Congress passed it to improve information in credit transactions and thus enhance the efficiency of credit markets, relying on "meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available" to achieve this goal. 15 U.S.C. § 1601(a).

Courts pay particular heed to the FRB Staff Commentary to TILA's regulations when evaluating an alleged TILA violation. The Supreme Court has held that "deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z[and] . . . [u]nless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive." *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 565, 100 S. Ct. 790, 63 L. Ed. 2d 22 (1980). In keeping with *Milhollin,* this court has deferred to the views of the FRB, as expressed in the Commentary, when we are called upon to interpret TILA. Our treatment of the commentary interpreting 15 U.S.C. § 1638(a)(6), the portion of TILA at issue in this case, is no exception. *Clay v. Johnson,* 264 F.3d 744, 748 (7th Cir. 2001).

TILA imposes an explicit requirement that a lender include "[t]he number, amount, and *due dates or period of payments scheduled to repay the total of payments*," in its Disclosure Statement to the borrower. 15 U.S.C. § 1638(a)(6) (emphasis added); *see also* 12 C.F.R. § 226.18(g)(1). The relevant section of the FRB commentary states that:

> To meet this requirement creditors may list all of the payment due dates. They also have the option of specifying the "period of payments" scheduled to repay the obligation. As a general rule, creditors that choose this option must disclose the payment intervals or frequency, such as "monthly" or "bi-weekly," and the calendar date the beginning

> payment is due. For example, a creditor may disclose that payments are due "monthly beginning on July 1, 1988." This information, when combined with the number of payments, is necessary to define the repayment period and enable a consumer to determine all of the payment due dates.

Supp. I, para. 18(g)(4)(I); 63 Fed. Reg. 16673. An "Exception" section immediately follows and allows some flexibility in the narrow situation where the first date of the lending period is unknown at the time the loan is issued. Supp. I, para. 18(g)(ii). This rule and exception are all that the commentary has to say about § 226.18(g)'s requirement to disclose the payment period. The FRB's interpretation does not strike us as so irrational that we would be required to disregard it. We conclude, therefore, that TILA requires a lender to state clearly on the Disclosure Statement either the due dates or period of payments scheduled. The question is whether TILA is satisfied if the form provides only enough information from which the consumer might infer either the due dates or the payment period.

TILA's purpose is achieved by promoting uniformity in credit documents. Atypical terms and forms can confuse borrowers, leading them to agree to credit products that they might have rejected had they understood them properly. For that reason, TILA requires that many items of information be disclosed in specified ways. If a lender does not disclose one such piece of information in the specified way, leaving

the borrower to make assumptions, then TILA has been violated. "[W]hether a particular disclosure is clear for purposes of TILA is a question of law that 'depends on the contents of the form, not on how it affects any particular reader.'" *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760, 764 (7th Cir. 2006) (citing *Smith v. Check-N-Go of Ill., Inc.*, 200 F.3d 511, 515 (7th Cir. 1999)). It is immaterial if the borrower in a particular transaction made the right assumptions about the terms and documents presented to her, if the form otherwise does not comply with the statute and regulations.

We have held that, when it comes to TILA, "hypertechnicality reigns." *Handy*, 464 F.3d at 764. (This is not, we recognize, the formulation that some of our sister circuits use. *See, e.g., Santos-Rodriguez v. Doral Mortgage Corp.*, 485 F.3d 12, 17 n.6 (1st Cir. 2007) (noting the difference between our standard and that of other circuits)). Our decision on the adequacy of Ameriquest's disclosure of the payment period depends on just how picky we think the statute is. The Supreme Court has held that "[t]he concept of 'meaningful disclosure' that animates TILA . . . cannot be applied in the abstract. Meaningful disclosure does not mean more disclosure. Rather, it describes a balance between competing considerations of complete disclosure . . . and the need to avoid . . . [informational overload]." *Milhollin*, 444 U.S. at 568 (internal quotation marks and citations omitted). Following *Milhollin*'s guidance, our approach means that when completeness of disclosure does not lead to

informational overload, completeness must be required. Rhetoric to one side, this leads to an outcome that is fairly similar to the one reached in our sister circuits.

We also strike the balance this way because the FRB specifically rejected our attempts at a more functional approach to TILA violations. In *Carmichael v. Payment Ctr., Inc.*, 336 F.3d 636, 641 (7th Cir. 2003), we held that "courts are to evaluate § 1638(a)(6)'s strictures functionally, not in formalistic manner [*sic*]." Shortly after we issued the *Carmichael* decision, the FRB amended its commentary to avoid exactly the kind of result we reached in *Carmichael*; it noted that our decision was the impetus for its action. The crux of the revised commentary is that when a specific requirement is straightforward, lenders should not be able to dance around it in their disclosures. In other words, the FRB opted for hypertechnicality.

B

In this case, Ameriquest cannot escape the fact that it committed a technical TILA violation by failing explicitly to state the payment period of Hamm's and Jones's loans on the Disclosure Statements. We do not doubt that many (or most) borrowers would understand that a mortgage with 360 payments due over approximately 30 years contemplates a payment by the borrower each month during those 30 years. But

unfortunately for Ameriquest, the Disclosure Statements do not say that; they do not even say that the transaction is for a "360-month loan" or anything similar. All they say, as the table we have provided above illustrates, is that 359 payments have to be made; the first one is due on a particular date, and after all 359 payments are made, one more payment in a slightly different amount will be due on another particular date. The latter date happens to fall about 30 years after the first due date. A borrower reading this form alone would have to make assumptions and take some steps in order to determine her payment period. She could not, for example, simply postpone payments 2-359 until approximately the last year of the loan and make one payment per day. The borrower would instead have to assume that her payments were evenly spaced over the 30 years and that each payment was due on the first of the month.

By contrast, punctilious compliance with TILA would require only that the Disclosure Statement contain the word "monthly" alongside the number of payments. This would be neither burdensome for the lender nor so detailed that the borrower would be buried in information. It serves both the goals of TILA and the needs of the borrower. As we have already noted, other forms provided to Hamm and Jones referred to a "monthly" payment period, but nowhere on the Disclosure Forms was this fact mentioned. Not on the front page, not on the back page, not even in "fine print." TILA does not require people to dig through a raft of forms and make assumptions

about which one is accurate and which trumps another. If the Disclosure Forms provided to Hamm and Jones had mentioned the "monthly" nature of the payments at all, we would have a different case here altogether.

Still, Ameriquest urges us to find that there are ambiguities in the statute, Regulation Z, and the Commentary that would absolve it of its obligation to disclose the payment period. For example, the Commentary refers to the explicit disclosure of the pay period or scheduled payment due dates as a "general rule." Ameriquest interprets this to imply that there are other, unstated ways to satisfy the disclosure requirement. However, "[a] statute and its implementing regulations should be read as a whole and, where possible, afforded a harmonious interpretation." *Carmichael,* 336 F.3d at 640. Here, they are easily and best read to reinforce an explicit disclosure requirement that can be made in just one of two ways, and that recognizes one narrow exception to that rule.

Ameriquest also argues that the lack of the phrase "using that term" in § 1638(a)(6) means that it is unclear what exactly constitutes a proper disclosure of the payment period. It is true that in other sections of TILA, a lender is required not just to make a particular disclosure, but also to make that disclosure using a particular term. *See* 15 U.S.C. § 1638(a)(3) (requiring disclosure of the "finance charge" and that the disclosure "us[e] that term"). The TILA sections that command the use of a particular term, however,

are different from the disclosure requirement imposed by § 1638(a)(6) in a critical way.

TILA requires the use of a designated term for items that might not otherwise be identifiable to a borrower if not labeled in a consistent way, such as "finance charge," "total of payments," and "annual percentage rate." *See* 15 U.S.C. § 1638(a). By contrast, the word "monthly" or "bi-weekly" does not need to be labeled as a "payment period" in order to be understood by a borrower. That seems to be precisely the type of information overload that *Milhollin* sought to avoid. The difference is made clear by § 1638(a)(8), which requires that the lender provide "[d]escriptive explanations of the terms 'amount financed,' 'finance charge,' 'annual percentage rate,' 'total of payments,' and 'total sale price' as specified by the Board" and also "us[e] th[ose] terms." These special terms not only have to be used, but also have to be explained. Thus, the requirement to use a specified term is one mechanism that TILA uses to ensure uniformity; there is no necessary implication that other aspects of the statute require the same treatment. Section 1638(a)(1), for example, requires disclosure of the "identity of the creditor required to make disclosure," but does not require the lender to use the exact term "identity." That does not mean the identity requirement can be satisfied through implication alone, nor would any lender expect that to be the case.

We emphasize that we are not holding that a Disclosure Form that fails to use the magic word

"monthly" will always fail to comply with the requirement in § 1638(a)(6) of disclosing the payment period. The Commentary itself lists "monthly" and "bi-weekly" only as two examples of the way in which a lender might comply with the rule. The key point is that the borrower should not have to make any assumptions; she should be told her payment period in explicit terms. (For example, a Disclosure Statement that said "payment is due on the first of every month from March 1, 2002, through January 1, 2032," would effectively tell the borrower that her payment period is monthly without using the word "monthly.") Because Ameriquest's form required such an assumption, it did not meet TILA's requirements.

III

At one level, it may seem unrealistic to think that Hamm and Jones did not realize that they were obligated to make monthly payments on their 30-year mortgages. Nonetheless, in today's diversified credit markets, such assumptions are not always well founded. There are many credit products now where the borrower pays nothing for a year or two and then begins regular payments, or where payments are clumped together for a time, to be followed by a balloon payment, or where the loan is structured in other ways to induce the borrower to patronize a particular lender or to facilitate a transaction for a cash-strapped borrower. Here, Hamm and Jones could not look at the Disclosure Statement and know with certainty how often their payments were due,

without additional information. That is the information that TILA required Ameriquest to furnish, but that it did not.

Ameriquest has not offered any reason to conclude that TILA's requirement that the Disclosure Statement include explicit information about the payment period did not apply here or that its forms complied with the rules. Ameriquest violated TILA, even if unintentionally, and the plaintiffs are entitled to relief. We AFFIRM the district court's grant of summary judgment against Ameriquest Mortgage Securities, Inc., in Jones's case. We REVERSE the district court's grant of summary judgment for defendant Ameriquest Mortgage Securities, Inc., against Hamm and hold that the district court must enter judgment in favor of Hamm against that company. Summary judgment in favor of Ameriquest Mortgage Company and AMC Mortgage Services, Inc., is proper in both cases, and we AFFIRM both district courts to that extent. Finally, we REMAND these cases for further proceedings consistent with this opinion.

Sarah Hamm, Plaintiff, v. Ameriquest Mortgage Company et al., Defendants.

No. 05 C 227

UNITED STATES DISTRICT COURT FOR THE NORTHERN OF ILLINOIS, EASTERN DIVISION

2005 U.S. Dist. LEXIS 21755

September 27, 2005, Decided
September 27, 2005, Filed

COUNSEL: For Sarah Hamm, Plaintiff: Daniel A. Edelman, Albert F Hofeld, III, Cathleen M. Combs, James O. Latturner, Edelman, Combs, Latturner & Goodwin, LLC, Chicago, IL.

For Ameriquest Mortgage Company, Defendant: Craig Allen Varga, Jaime S. Roginski-Kord, Jonathan N. Ledsky, Varga, Berger, Ledsky, Hayes & Casey, Chicago, IL.

JUDGES: Samuel Der-Yeghiayan, United States District Judge.

OPINION BY: Samuel Der-Yeghiayan

OPINION

MEMORANDUM OPINION

SAMUEL DER-YEGHIAYAN, District Judge

This matter is before the court on Defendant Ameriquest Mortgage Company's, Defendant Ameriquest Mortgage Securities, Inc.'s, and Defendant

AMC Mortgage Services' (collectively referred to as "Ameriquest") motion for summary judgment. For the reasons stated below, we grant the motion for summary judgment.

BACKGROUND

Plaintiff Sarah Hamm ("Hamm") alleges that on January 19, 2002, she obtained a mortgage loan from Defendant Ameriquest Mortgage Company which was secured by a mortgage on her residence in Markam, Illinois. Hamm claims that she sought out the loan in order to pay off her credit cards, make home repairs, and pay off the loan on a family member's car. Hamm alleges that based upon her discussions with Ameriquest employees prior to the closing on the mortgage, Hamm believed that she was going to receive a fixed-rate loan, but that at the closing she discovered that she was receiving an adjustable rate loan that could have interest rates as high as 16.99%. Hamm also contends that the payment schedule for the loan payments was not adequately disclosed to her before closing. Hamm acknowledges that, despite her misgivings about the change in terms in the mortgage and the lack of clarity in the disclosures to her, Hamm signed all the closing documents. The closing documents included a Notice of Right to Cancel that informed Hamm of a three day recision period during which she had a right to rescind the mortgage agreement. Hamm also signed a One Week Form that informed her of Ameriquest's policy of providing her with seven days to cancel the mortgage agreement.

Hamm also signed a document that represented she had read and understood all the documents. Hamm claims that she was told at closing that she would receive a copy of the closing documents "in a couple of days" and that she received the documents two days after the closing. Hamm alleges that Ameriquest assigned her mortgage to Ameriquest Mortgage Securities, Inc. and the loan is being serviced by AMC Mortgage Services. Hamm brought the instant action seeking to have the mortgage rescinded based upon alleged deficiencies in the disclosures relating to her recission rights and the payment plan that were provided by Ameriquest in violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601. Hamm also seeks statutory damages and attorneys' fees under TILA.

LEGAL STANDARD

Summary judgment is appropriate when the record, viewed in the light most favorable to the non-moving party, reveals that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In seeking a grant of summary judgment, the moving party must identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (quoting Fed. R. Civ. P. 56(c)). This

initial burden may be satisfied by presenting specific evidence on a particular issue or by pointing out "an absence of evidence to support the non-moving party's case." *Id.* at 325. Once the movant has met this burden, the non-moving party cannot simply rest on the allegations in the pleadings, but, "by affidavits or as otherwise provided for in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A "genuine issue" in the context of a motion for summary judgment is not simply a "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Rather, a genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 599 (7th Cir. 2000). The court must consider the record as a whole, in a light most favorable to the non-moving party, and draw all reasonable inferences that favor the non-moving party. *Anderson*, 477 U.S. at 255; *Bay v. Cassens Transport Co.*, 212 F.3d 969, 972 (7th Cir. 2000).

DISCUSSION

Ameriquest argues that it is entitled to summary judgment because its disclosures regarding the right to recision and the payment schedule were proper

under TILA. Ameriquest also argues that statutory damages are barred by the statute of limitations.

I. Disclosure of Recision Rights

Hamm argues that Ameriquest did not adequately inform her of her recision rights under TILA. Pursuant to 15 U.S.C. § 1635(a), a consumer of a credit transaction "shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under [Section 1635] together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so." 15 U.S.C. § 1635(a). The creditor is required to "clearly and conspicuously disclose" to the consumer his or her right to rescind the transaction within the specified period. *Id.* Whether or not disclosures comply with "TILA-mandated disclosures is determined from the standpoint of the ordinary consumer." *Rivera v. Grossinger Autoplex, Inc.*, 274 F.3d 1118, 1121-22 (7th Cir. 2001); *see also Lifanda v. Elmhurst Dodge, Inc.*, 237 F.3d 803, 806 (7th Cir. 2001) (cautioning the courts not to deem an ordinary consumer to have the business and legal knowledge of "a Federal Reserve Board member, federal judge, or English professor").

In the instant action, Hamm admits pursuant to Local Rule 56.1 that Ameriquest's Notice of Right to

Cancel is identical to Recision Model Form H-8 and thus Ameriquest would be entitled to a safe harbor protection in regards to the Notice of Right to Cancel pursuant to 15 U.S.C. § 1604. Hamm acknowledges that the Notice of Right to Cancel was sufficient, but argues that "Ameriquest negated [the] otherwise clear and conspicuous disclosure of the right to cancel by delivering a 'One-Week Cancellation Period' form." (Ans. SJ 8). Hamm also contends that the One Week Form would create confusion for an ordinary consumer by apparently modifying or waiving the clearly established three day recision period included in the Notice of Right to Cancel. Hamm contends that although the seven day extension period provided in the One Week Form appears to be a concession provided by the generosity of Ameriquest, the form actually is intended to create confusion and inhibit a loan applicant's ability to cancel mortgage agreements.

We first note that Hamm concedes that she did not actually rely upon the One Week Form and therefore did not suffer any actual damages based upon the One Week Form. Hamm admits pursuant to Local Rule 56.1 that she did not read the One Week Form until months after the closing. (R SF 21). Actually, Hamm admitted at her deposition and admits pursuant to Local Rule 56.1 that she "did not rely on any of the statement contained in the one Week Form" and that it "had no influence on her at all." (R SF 23). Hamm also acknowledges that she was given an opportunity to read the One Week Form at the closing

and signed a document stating that she read and understood all the documents, even though she did not do this. (R SF 6, 8). Hamm admits pursuant to Local Rule 56.1 that "she did not wish to cancel her loan during the federal three day recision period or during Ameriquest's seven day recision period." (R SF 24). Hamm is thus seeking to rescind the mortgage agreement and statutory damages based solely upon a technical and immaterial contention.

Hamm admits that she was provided with the appropriate three day notice in the Notice of Right to Cancel. The mere fact that Ameriquest provided Hamm with a separate document that explained Ameriquest's policy allowing a loan applicant seven days to cancel the loan agreement clearly should not have in any way confused an ordinary consumer. The express instructions in the Notice of Right to Cancel explaining the three day recision rights was not in any way altered or abrogated by the language in the One Week Form. The One Week Form begins by specifically delineating the right to a three day recision period, which is described as a "right under Federal or state law." (R SF 18). In a separate paragraph later in the one Week Form, Ameriquest explains that it is their policy to give one week to a loan applicant to cancel the loan in order to "give [the consumer] more time to study [the] loan documents, obtain independent advice and/or shop for a loan that [the consumer] believes is better. . . ." (R SF 18). It would be clear to an ordinary consumer that the three day recision period and the one week cancellation period provided to Hamm are not synonymous. Also,

as noted above, the Notice of Cancellation was provided to Hamm on a separate form from the One Week Form. Thus, no reasonable trier of fact could conclude that Ameriquest's disclosures regarding the right of recision were inadequate under TILA.

II. Payment Schedule

Hamm also argues that the payment schedule was not adequately disclosed by Ameriquest. She contends that she did not understand that her payments would be monthly payments because the word "monthly" did not appear in the mortgage documents. However, the payment schedule was adequately laid out in several documents signed by Hamm at the closing. She also signed documents that explained that there would be approximately 360 payments due over the course of 360 months. (R SF 26). Thus, it should have been clear to an ordinary consumer that her payments would be monthly and she should not have had any confusion regarding the payment schedule. Hamm's arguments clearly seek to manufacture a point of confusion where none existed for the purposes of defeating the summary judgment motion. Thus, no reasonable trier of fact could conclude that the disclosures regarding the payment schedule were not clear for an ordinary consumer. We also note that Hamm admits pursuant to Local Rule 56.1 that she "understood both prior to, and after, her loan closing that her payment would be due monthly," (R SF 12), and that her complaints about the adequacy of the payment schedule is also based solely on a technical and immaterial contention.

III. Statute of Limitations

We also note that even if we were to deny Ameriquest's motion for summary judgment based upon the above issues, Hamm's request for statutory damages are time-barred by the statute of limitations. Pursuant to 15 U.S.C. § 1640(e), "any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). Hamm alleges that the loan closing was in 2002 and she did not bring the instant action until January of 2005, which is well after the limitations period. Hamm argues that since she has an extended right to rescind the agreement, the statute of limitations period is also extended. However, Hamm cites no controlling precedent to support such a notion. We agree with the holding in *Brown v. Nationscredit Financial Services Corp.*, 349 F. Supp. 2d 1134 (N.D. Ill. 2005), which addressed and rejected the same argument that is presented by Hamm. In *Brown*, the plaintiff pointed out that "if the lender neglects to make a material disclosure as defined in the implementing regulations, the borrower's right to rescind may be extended for up to three years." *Id.* at 1137. The plaintiff in *Brown* thus argued that a statutory damages claim based upon recision rights disclosures is provided a three year statute of limitations period. *Id.* The court in *Brown* stated that it did "not believe that in adopting § 1635(g), Congress intended to alter the one-year statute of limitations applicable to damage claims"

and that "[n]otably, § 1635(g) contains no language to suggest that Congress intended to override the statute of limitations set out in § 1640(e)." *Id.* Therefore, even if we were not to grant summary judgment on the above issues, Hamm would be barred from recovering statutory damages in the instant action.

CONCLUSION

Based on the foregoing analysis, we grant Ameriquest's motion for summary judgment.

Samuel Der-Yeghiayan

United States District Court Judge

Dated: September 27, 2005

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that summary judgment is entered in favor of defendant Ameriquest Mortgage Company et al and against plaintiff Hamm. This action is dismissed in its entirety.

Date: 9/27/2005

SHIRLEY JONES, Plaintiff, v. AMERIQUEST MORTGAGE COMPANY, AMERIQUEST MORTGAGE SECURITIES, INC., and AMC MORTGAGE SERVICES, INC., Defendants.

No. 05-CV-0432

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2006 U.S. Dist. LEXIS 3788

January 31, 2006, Decided

COUNSEL: For Shirley Jones, Plaintiff: Daniel A. Edelman, Albert F Hofeld, Jr., Cathleen M. Combs, James O. Latturner, Edelman, Combs, Latturner & Goodwin, LLC, Chicago, IL.

For Ameriquest Mortgage Company, AMC Mortgage Services, Inc., Defendants: Craig Allen Varga, Jaime S. Roginski-Kord, Jonathan N. Ledsky, Varga, Berger, Ledsky, Hayes & Casey, Chicago, IL.

For Ameriquest Mortgage Securities, Inc., Defendant: Craig Allen Varga, Jonathan N. Ledsky, Varga, Berger, Ledsky, Hayes & Casey, Chicago, IL.

JUDGES: David H. Coar, United States District Judge.

OPINION BY: David H. Coar

OPINION

MEMORANDUM OPINION AND ORDER

Plaintiff Shirley Jones ("Plaintiff") has filed this action against Defendants Ameriquest Mortgage Company, Ameriquest Mortgage Securities, Inc., and AMC Mortgage Services, Inc. (collectively, "Defendants") to rescind her mortgage and recover statutory damages for violations of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* Before this Court are Plaintiff's Motion for Summary Judgment and Defendants' Motion for Partial Summary Judgment. Also before this Court is Defendants' Motion to Strike Portions of Materials Submitted by Plaintiff in Support of Her Motion for Summary Judgment and to Deem Certain Facts Admitted. For the reasons set forth below, Defendants' motion to strike is granted in part and denied as moot in part. Plaintiff's motion for summary judgment is granted in part and denied in part. Defendants' motion for partial summary judgment is denied.

I. DEFENDANTS' MOTION TO STRIKE

Defendants move to strike portions of (1) Plaintiff's Reply Memorandum in Support of her Motion for Summary Judgment (the "Reply") and the appendices thereto and (2) Plaintiff's Response to Defendants' Statement of Additional Uncontested Material Facts that Require Denial of Plaintiff's Motion for Summary Judgment (the "Response").

A. Plaintiff's Reply and its Appendices

Defendants move to strike pages 1-6 of Plaintiff's Reply and Appendices 8 and 9, attached to the Reply, because those pages contain new factual allegations, inadmissible hearsay, immaterial arguments, and facts that, if material, should have been included in Plaintiff's L.R. 56.1 Statement rather than in her reply brief.

In the first six pages of her Reply, Plaintiff presents several enumerated "facts," one of which is that Defendant Ameriquest Mortgage Company ("Ameriquest") is under investigation in 30 states for unlawful and unethical business practices. The Reply admits that this "fact" is "not offered as evidence of any point in this case," but nonetheless attaches as support Appendices 8 and 9 which contain multiple newspaper articles about Ameriquest's questionable business practices. Pl.'s Reply in Support of Summ. J. at 1. The remainder of the "facts" in the first six pages painstakingly detail the history of Plaintiff's dealings with Ameriquest, and comment extensively on the quality of customer service Plaintiff received.

To the extent that, in these six pages and in Appendices 8 and 9, Plaintiff is raising new claims about Ameriquest's business practices and her dealings with Ameriquest, Plaintiff cannot do so. In a motion for summary judgment, the moving party generally may not raise new issues in its reply brief. *See Aircraft Gear Corp. v. Marsh*, 2004 U.S. Dist. LEXIS 19859, No. 02 C 50338, (N.D. Ill. Sept. 30,

2004). Similarly, under the Local Rules, a party may not present facts for the Court's consideration in a reply brief as opposed to a Statement of Material Facts or a Statement of Additional Facts. *See Bethine W. Alberding Estate Admin. Trust v. Vinoy Park Hotel Co.*, 2005 U.S. Dist. LEXIS 6274, No. 03 C 1250, 2005 WL 730960, *1 n.1 (N.D. Ill. Mar. 24, 2005). Finally, Plaintiff herself has admitted that first "fact" she presents is irrelevant to the motions presently before the Court. So too are the remainder of the facts to the extent that they discuss Plaintiff's dealings with Ameriquest but not the two issues presented for summary judgment. Defendants' motion to strike pages 1-6 of Plaintiff's Reply in Support of Summary Judgment and Appendices 8 and 9 attached thereto is granted.

B. Plaintiff's Response to Defendants' L.R. 56.1 Statement

Defendants also move to strike the portions of Plaintiff's Response to Defendants' L.R. 56.1 Statement that contain argument or conclusions of law, or contain denials without citing evidentiary support. Defendants filed their motion to strike on November 4, 2005. Five days later, Plaintiff filed a Motion for Leave to File an Amended Response to Defendants' Statement of Additional Uncontested Material Facts. The Court granted Plaintiff leave, and Plaintiff's Amended Response cures the ills about which Defendants complain. The Court, therefore, considers this portion of Defendants' motion to strike moot.

II. LEGAL STANDARD

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists only if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The movant bears the burden of establishing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the movant meets this burden, the non-movant must set forth specific facts (a "scintilla of evidence" is insufficient) demonstrating that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Anderson,* 477 U.S. at 252. *See also Celotex,* 477 U.S. at 324. When reviewing a motion for summary judgment, the court must view the facts in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Schuster v. Lucent Technologies, Inc.*, 327 F.3d 569, 573 (7th Cir. 2003). Where, as here, cross-motions for summary judgment are involved, as to each motion, the nonmovant's version of any disputed fact is credited.

Congress enacted the Truth in Lending Act ("TILA") to promote the informed use of credit. 15 U.S.C. § 1601(a). To that end, TILA requires creditors

to clearly and conspicuously disclose certain terms and costs of credit to consumers before a credit transaction takes place. *See* 12 C.F.R. § 226.17. The Seventh Circuit has repeated that the "sufficiency of TILA-mandated disclosures is to be viewed from the standpoint of an ordinary consumer, not the perspective of a Federal Reserve Board member, federal judge, or English professor." *Smith v. Cash Store Management,* 195 F.3d 325, 328 (7th Cir. 1999) (internal quotation marks omitted).

It is "well settled" in the Seventh Circuit that a borrower need not have been mislead or have suffered any actual damages from a TILA violation to recover under the act. *Brown v. Marquette Savings & Loan Association,* 686 F.2d 608, 614 (7th Cir. 1982). Instead, the statute imposes a kind of strict liability on the lender:

> It is not sufficient to attempt to comply with the spirit of TILA in order to avoid liability. Rather, strict compliance with the required disclosures and terminology is required. Many violations of TILA involve technical violations without egregious conduct of any kind on the part of the creditor. However, Congress did not intend that creditors should escape liability for merely technical violations.

Smith v. No. 2 Galesburg Crown Finance Corporation, 615 F.2d 407, 416 (7th Cir. 1980), *overruled on other grounds, Pridegon v. Gates Credit Union,* 683 F.2d 182 (7th Cir. 1982) (internal citations omitted). Thus,

"[s]ubject to narrow exceptions, hypertechnicality reigns in the application of TILA." *Cash Store Management*, 195 F.3d at 328 (7th Cir. 1999) (internal quotation marks omitted).

III. FACTS[1]

In early March 2002, Plaintiff obtained a loan from Defendant Ameriquest Mortgage Company. The loan was secured by a mortgage on the home Plaintiff owns with her brother at 6151 South Wolcott in Chicago, IL. At closing of the loan on March 12, 2002, Plaintiff was presented with and signed the following documents: (1) a note; (2) a mortgage; (3) a Truth in Lending Disclosure Statement (the "Disclosure Statement"); (4) several Notice of Right to Cancel forms; and (5) a document entitled "One Week Cancellation Period" (the "One-Week form").

The Disclosure Statement Ameriquest provided Plaintiff states that "payments are due beginning" "05/01/2002." It also states the number of payments (360) and the due date of the final payment (04/01/2032). It states that Plaintiff was to make 359 payments of $480.01 beginning 05/01/02, and one payment of $462.79 on 04/01/32.

The Notice of Right to Cancel form tells the borrower: "you have a right under federal law to

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[1] The following facts are undisputed and are taken from the parties' Local Rule 56.1 materials.

cancel this transaction, without cost, within THREE BUSINESS DAYS from whichever of the following events occurs last," after which the form lists the date of the transaction, the date the borrower will have received her Truth in Lending Disclosure Statement, or the date she receives notice of her right to cancel. The form details how the borrower may communicate an intent to cancel, and what the lender must do to reflect the fact that the loan has been cancelled.

The One-Week form provides:

> You have the right under Federal or state law to three (3) business days during which you can cancel your loan for any reason. This right is described in the Notice of Right to Cancel you have received today.
>
> Ameriquest Mortgage Company believes that a loan secured by your home is one of the most important financial decisions you can make. To give you more time to study your loan documents, obtain independent advice and/or shop for a loan that you believe suits you better, we provide you with one-week (which includes the day you sign the loan documents) to cancel the loan with no cost to you. No money will be disbursed before 10:00 a.m. on the first business day after this period experiences. Business days are Monday through Friday, excluding federal legal holidays. For example, if your loan closes on a Tuesday, you could cancel from that Tuesday through midnight of the following Monday.

Defendant Ameriquest Mortgage Securities, Inc. now owns Plaintiff's loan and Defendant AMC Mortgage Services, Inc. is the loan servicer. On January 4, 2005, Plaintiff sent notice of her intent to rescind the loan to Defendants. Defendants have not yet rescinded Plaintiff's loan.

Plaintiff, therefore, filed the instant Complaint on January 25, 2005, seeking rescission, statutory damages, and attorney fees and costs for the alleged violations of TILA discussed below.

IV. DISCUSSION

Plaintiff moves for summary judgment on two of the four grounds for rescission of her mortgage loan alleged in her complaint. First, Plaintiff alleges that her TILA Disclosure Statement failed to fully and completely disclose the repayment schedule for her loan in the manner specified by TILA. Second, Plaintiff alleges that Ameriquest's One-Week form, when offered in conjunction with the Notice of Right to Cancel form, violates TILA's requirement that the creditor clearly and conspicuously disclose the borrower's absolute right to cancel the transaction within three business days. Defendants move for partial summary judgment in their favor on these same issues: They argue that they properly disclosed Plaintiff's repayment schedule and clearly disclosed Plaintiff's right of cancellation in accordance with TILA. Defendants further argue that the statute of

limitations bars Plaintiff's request for statutory damages.

A. Truth in Lending Act

For homeowners like Plaintiff who use their homes to secure credit for purposes other than the acquisition of the home, TILA provides a right to rescind the loan transaction for three days after it takes place. *See* 15 U.S.C. § 1635(a)(3). TILA requires the creditor to "clearly and conspicuously" disclose this right on a separate document identifying the transaction, how the borrower can exercise the right, and what the effects are of exercising the right. 12 C.F.R. § 226.23(a)(4)(b)(1). A consumer may not modify or waive her right to rescind absent a signed, written statement explaining that she needs credit for a bona fide personal emergency. 12 C.F.R. § 226.23(e)(1).

If the creditor fails to deliver to the consumer the required notice of her right to rescind or any other material disclosure, the consumer's right to rescind automatically extends from three business days to three years. 12 C.F.R. § 226.23(a)(3). "Material disclosures" include disclosure of "the total of payments, the number and amount of payments, [and] the due dates or periods of payments scheduled to repay the indebtedness." 15 U.S.C. § 1602(u). *See also* 15 U.S.C. 1638(a)(6) ("the creditor shall disclose . . . [t]he number, amount, and due dates or period of payments scheduled to repay the total of payments).

The implementing regulation, Federal Reserve Board Regulation Z ("Regulation Z"), reiterates this requirement, A creditor must disclose "the number, amounts, and timing of payments scheduled to repay the obligation. 12 C.F.R. § 226.18(g). The Federal Reserve Board Commentary provides even more specific guidance:

> Section 226.18(g) requires creditors to disclose the timing of payments. To meet this requirement, creditors may list all of the payment due dates. They also have the option of specifying the "period of payments" scheduled to repay the obligation. As a general rule, creditors that choose this option must disclose the payment intervals or frequency, such as "monthly" or "bi-weekly," and the calendar date that the beginning payment is due. For example, a creditor may disclose that payments are due "monthly beginning on July 1, 1998." This information, when combined with the number of payments, is necessary to define the repayment period and enable a consumer to determine all of the payment due dates.

12 C.F.R. Pt. 226, Supp. I, para. 18(g)(4)(i). This commentary is dispositive unless "demonstratively irrational." *Clay v. Johnson*, 264 F.3d 744, 748 (7th Cir. 2001) (*citing Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565-66, 100 S. Ct. 790, 63 L. Ed. 2d 22 (1980)).

B. Payment Schedule

Plaintiff argues that TILA, Regulation Z, and the accompanying commentary clearly require Defendants to include in Plaintiff's TILA Disclosure Statement the number, amounts, and timing of her repayments, but Defendants did not do so. Indeed, Plaintiff's Disclosure Statement lists the number of payments she is to make (360), and the amounts ($480.01 and $462.79), but not "the due dates or periods of payments scheduled to repay the indebtedness." 15 U.S.C. § 1602(u) (emphasis added). The Disclosure Statement lists the due date for the first and last payment, but not the due dates for *all* of Plaintiff's payments and not the period, interval, or frequency of Plaintiff's payments. The commentary for Regulation Z makes clear that creditors have the option of doing either. *See* 12 C.F.R. Pt. 226, Supp. I, para. 18(g)(4)(i). Defendants did neither.

Defendants argue that, to find a violation, Plaintiff has resorted to one sentence in the commentary that supplies a permissive, non-exclusive example of what a creditor *may* do, not an express requirement that the word "monthly" be used. It is true that the commentary states, "as a *general rule,* creditors . . . must disclose the payment intervals or frequency, *such as* 'monthly' or 'bi-weekly.'" 12 C.F.R. Pt. 226, Supp. I, para. 18(g)(4)(i) (emphasis added). The commentary, however, discusses the exceptions to that general rule, and none apply to Defendants. *See* 12 C.F.R. Pt. 226, Supp. I, para. 18(g)(4)(ii) (describing the exceptions as the "limited number of

circumstances [when] the beginning-payment date is unknown and difficult to determine at the time disclosures are made."). Indeed, Defendants have not even argued that they fall within the commentary's exceptions. Defendants, then, were to follow the general rule of listing all of Plaintiff's payment dates or describing Plaintiff's payment intervals with a word such as "monthly."

Defendants' argument that they did disclose the fact that monthly payments were to be made, only they did so with numbers as opposed to words, is also unavailing. According to Defendants, an ordinary consumer would understand that the Disclosure Statement lists 359 plus 1 payment and "there are 360 months in 30 years and . . . therefore, [Plaintiff's] 360 payments would be due monthly." Def.'s Reply in Support of Their Mot. for Partial Summ. J. at 14. Nothing in the Federal Reserve Board's commentary or model forms (all of which use the phrases "monthly beginning" or "monthly starting"), suggests that numbers alone, not words, be used to disclose the frequency of payments unless, of course, the creditor lists all of the payment due dates.

Defendants further argue that Plaintiff was never confused by the incomplete Disclosure Statement. Indeed, Plaintiff has admitted to understanding at the time that her payments were to be made monthly, and she signed multiple other documents at the closing stating as much. The standard applied to TILA claims, however, renders these facts irrelevant. As noted earlier, a borrower in this Circuit need not

have been mislead or have suffered any actual damages from a TILA violation to recover under the act. *See Brown,* 686 F.2d at 614. Nor is the fact relevant that other documents involved in the transaction indicated that Plaintiff's payments were to be made monthly. TILA regulations dictate that "the disclosures shall be grouped together, shall be segregated from everything else, and shall not contain any information not directly related to the disclosures required under § 226.18." 12 C.F.R. § 226.17(a)(1). Therefore, the timing of payments, which is one of the required disclosures under § 226.18, *see* 12 C.F.R. 226.18(g), must be grouped with the other required disclosures on the one TILA Disclosure Statement Defendants provide.

Finally, Defendants urge this Court to follow *Hamm v. Ameriquest Mortgage Co.*, 2005 U.S. Dist. LEXIS 21755, No. 05 C 227, 2005 WL 2405804 (N.D. Ill. Sept. 27, 2005) (Der-Yeghiayan, J.), which involved the same Defendants and virtually identical claims. This Court, however, respectfully disagrees with the ruling in *Hamm* that "it should have been clear to the ordinary consumer that [the plaintiff's] payments would be monthly and she should not have had any confusion regarding the payments schedule." 2005 U.S. Dist. LEXIS 21755 at *9. This conclusion ignores the rule that a borrower need not have been mislead or actually confused by a creditor for a finding of a TILA violation. *See Brown,* 686 F.2d at

614.[2] Similarly, the conclusion in *Hamm* that the plaintiff's complaint "about the adequacy of the payment schedule is . . . based solely on a technical and immaterial contention" ignores the rule that "strict compliance with the required disclosures and terminology is required" despite the fact that "many violations of TILA involve technical violations without egregious conduct of any kind on the part of the

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[2] Defendant urges this Court to follow *Redner v. Bailey and Assoc.*, 1991 U.S. Dist. LEXIS 20508, No. 90 C 20317, 1991 WL 352529 (N.D. Ill. Dec.17, 1991) (Roszkowski, J.), for the same reason. The Court in *Redner* ruled against the plaintiff, noting that "[a] simple reading of the installment contract shows that the payments are due monthly beginning January 12, 1990. Plaintiff should have read the contract before coming to this court." 1991 U.S. Dist. LEXIS 20508 at *4. The facts of *Redner*, however, are distinguishable since *Redner* involved a *retail installment contract* that *incorporated* the repayment schedule and the required TILA disclosures, not a *mortgage loan* with a *separate* TILA Disclosure Statement. Furthermore, like *Hamm*, *Redner* contains no analysis of the plaintiff's claims in light of the Seventh Circuit's TILA standard. Thus, this Court will not follow *Redner*. Nor is *Pridgeon v. Gates Credit Union*, 683 F.2d 182 (7th Cir. 1982), dispositive. First, Defendants quote Pridgeon out of context. When the Pridgeon court ruled that "meaningful disclosure does not mean more disclosure," it was discussing disclosure by incorporating references, which is not at issue here. *See id.* at 195. Second, the facts of *Pridgeon* are distinguishable, as that case involved a plaintiff who complained that the loan agreement did not disclose the *correct* amount of her payments on two different loans; that the amount displayed could not be reconciled with two other documents; and that she made monthly payments but the loan agreement cited a weekly payment figure. *See id.* at 187-88.

creditor." *No. 2 Galesburg*, 615 F.2d at 416. *Hamm* cites none of this Seventh Circuit case law.[3]

As Plaintiff points out, simply inserting the word "monthly" after the phrase "payments due beginning" would have saved the Disclosure Statement. The failure to do so, however technical,[4] gives rise to Plaintiff's right to rescind her mortgage loan for up

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[3] Furthermore, "hypertechnicality" is the standard employed in this Circuit, not "total mix of information," the standard from the Eleventh Circuit that Defendants advocate. *See In re Smith*, 737 F.2d 1549, 1555 (11th Cir. 1984) (finding a failure to disclose the extent of a security interest immaterial under TILA when the failure does not affect the "total mix of information available the consumer"). The Seventh Circuit has also rejected yet another standard Defendants advocate – that the district judge should "not read[ ] one sentence or one line of the disclosure statement in isolation" to determine whether there has been clear and substantial disclosure. *See Shroder v. Suburban Coastal Corp.*, 550 F. Supp. 377, 382 (S.D. Fla. 1982) (*citing Dixon v. D.H. Holmes Co.*, 566 F.2d 571, 571 (5th Cir. 1978) (stating that TILA is "not an act that requires sacrament in language. It does not require the use of shibboleths or other sacred terms.")). In *No. 2 Galesburg*, 615 F.2d at 417, the Seventh Circuit looked with disfavor upon the "ad hoc analysis utilized by the . . . court in *Dixon*" and ruled instead that "strict adherence to the required terminology under the statute and regulations" would be required.

[4] Defendants also oppose against the technical application of TILA against them because of *Streit v. Fireside Chrylser-Plymouth, Inc.*, 697 F.2d 193 (7th Cir. 1983). The *Streit* court, however, only ruled that it was "not necessary or appropriate to hold creditors absolutely liable for every non-compliance and to disregard completely the factual situation out of which the claim has arisen" because no credit transaction actually took place in that case. *See id.* at 196.

to three years after the March 12, 2002 date of the loan transaction.

C. One-Week Form

Defendant maintains that its One-Week form complies with TILA. Plaintiff argues that the form detracts from the clarity and conspicuousness of the federal Notice of Right to Cancel form in three ways.

First, Plaintiff argues that the form misleads the ordinary consumer by failing to draw a distinction between the rescission rights Defendants confer and the rights that cancelling during the TILA window confers. Specifically, if the consumer relies on the One-Week form and waits to cancel after the third day, she in fact no longer has any of TILA's statutory protections, such as the ability to access the federal court, the ability to bring a claim for statutory damages, and the ability to recover attorney fees. The form does nothing to notify the borrower of this diminution of benefits. Thus, Plaintiff argues, the One-Week form operates as an impermissible waiver and modification of the consumer's TILA recession rights. *See* 12 C.F.R. § 226.23(e)(1) (generally prohibiting modification or waiver).

Second, Plaintiff argues that the mere fact that the two forms state different cancellation periods (three days versus seven days) is confusing for the ordinary consumer. Third, Plaintiff argues that Defendants' One-Week form contains information

that conflicts with the federal notice form. Namely, it has a different method of counting days and explains a different procedure to follow for cancellation. These differences, Plaintiff argues, increase the likelihood that the consumer will mix-up the conflicting instructions, make a mistake in cancellation, and risk not having her cancellation honored. Plaintiff points to the fact that Ameriquest employees even have the assistance of an internal document, called a "job aid," to help them to avoid confusion when calculating the different rescission periods; Defendants do not furnish a comparable aid to borrowers.

Defendants argue that Plaintiff was not confused by the two forms, did not wish to cancel her loan during the either of the rescission periods, and did not act in reliance on the One-Week form. These arguments are irrelevant given the TILA standard. Defendant's argument that TILA creates a safe harbor for lenders who use the model federal notice forms provided by the Federal Reserve Board also misses the point. *See* 15 U.S.C. § 1604(b). Plaintiff does not protest the *content* of the Notice of Right to Cancel form provided by Defendants, but the effect of providing that form with a second form that encourages borrowers to delay their cancellation decision without advising them of the risk of doing so.

There is little case law to guide the Court here.[5] Defendants urge this Court to follow *Hamm v. Ameriquest Mortg. Co.*, 2005 U.S. Dist. LEXIS 21755, No. 05 C 227, 2005 WL 2405804 (N.D. Ill. Sept. 27, 2005) (Der-Yeghiayan, J.), which considered an identical claim. In *Hamm*, the court found that no reasonable trier of fact could conclude that Defendants' disclosures were inadequate because the two separate notice forms that could not be confused as synonymous were provided; the One-Week form reminds the borrower of her federal right; and the One-Week form

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[5] Most of the cases Plaintiff cites involve Election Not to Cancel forms, a factual situation not present here. In those cases, TILA was violated when the creditor advised the consumer of her right to rescind, but simultaneously told the consumer that she had waived that right or required the consumer to sign a document at closing waiving that right. *See, e.g., Smith v. Cash Store Management*, 195 F.3d 325, 332 (7th Cir. 1999). Further, in *Henlon v. Goldome Credit Corp.*, No. 87-2347-CIV, 1988 U.S. Dist. LEXIS 17464 (S.D. Fla. July 14, 1988), a district court held that giving a consumer more than the statutory three days to cancel was misleading. But in that case, the company claimed to have extended (and, therefore, modified) the *TILA* period of cancellation, not, as here, merely offered a longer, company-specific period of cancellation. Defendants cite cases that establish there is no violation of TILA when a creditor provides greater rights than the statute requires, or inadvertently recites a TILA expiration date later than the third day and no prejudice to the consumer results. *See, e.g., Kramer v. Home Savings of America, FSB*, 721 So. 2d 1239, 1240 (Fla. Dist. Ct. App. 1998); *Hawaii Cmty. Fed. Credit Union v. Keka*, 94 Haw. 213, 11 P.3d 1, n.9 (Haw. 2000). These cases are unhelpful, however, since Plaintiff's argument is that the One-Week form does prejudice the consumer since it leaves unassuming borrowers with less rights, not greater rights, in days four-through-seven.

did not alter or abrogate in any way the express instructions in the federal notice form. *See* 2005 U.S. Dist. LEXIS at *8. Defendants also believe they should not be held liable for conferring an additional benefit on borrowers (*i.e.*, extra time to decide whether to cancel the loan transaction) in furtherance of TILA's goals. This, however, is not Plaintiff's claim: Plaintiff argues that a consumer who relies on Defendants' promise of seven days to cancel, instead of the three days mentioned in the federal form, actually *loses* benefits without being warned as much in advance. *Hamm* does not address this argument.

A case that does is *Williams v. Empire Funding Corp.*, 109 F. Supp. 2d. 352 (E.D. Pa. 2000). In that case, a financing agreement had a federal box with the required TILA disclosure about rescission but also a "Note to Buyer" at the bottom of the page with a different message about rescission. The court concluded that an ordinary consumer could read the messages together and be confused about how the right to rescind works, the starting point for each period of rescission, *and the consequences of choosing one method of rescission over the other* (*i.e.*, whether or not rescission would relieve the consumer of associated costs and damages). *See id.* at 359-361. The *Williams* court ruled, therefore, that "including two inconsistent periods for rescission in the financing agreement rendered the notice of the right to rescission required under TILA unclear." *Id.* at 361. Plaintiff's complaints mirror those of the plaintiff in *Williams:* The two rescission notices together could

confuse the borrower about the length of each rescission period and, more persuasively, the consequences of choosing one method of rescission over the other, given that the second form does not explain whether or not cancelling in seven days affords the borrower the statutory protections that cancelling within three days does.

Defendants maintain that there are no consequences for consumers who rely on the One-Week form. *See, e.g.,* Def.'s Reply in Support of Their Mot. for Summ. J. at 8-9 ("The *undisputed evidence* in this case is that Ameriquest does not make any distinction between loans that are cancelled within the three day federal rescission period and those that are cancelled during the period specified under the One Week Form"). But Defendants offer no evidentiary support for this assertion. Nothing that Defendants provide to borrowers explicitly states or guarantees that Defendants provide or intend to provide all of the TILA rights and remedies for a borrower who uses the One-Week form to cancel during days four-through-seven after closing. Further the facts show that the One-Week form is not anchored to any statute or Ameriquest internal policy that ensures TILA protections for the borrower during days four-through-seven.

A reasonable fact finder, then, could conclude that, for an ordinary consumer, the One-Week form detracts from the clarity of the federal form in that the One-Week form purports to be a mere extension of the TILA right but does not explain the differences, if any, in the rescission rights. Indeed, a fact finder is

needed to determine whether those differences exist. Plaintiff asserts several such differences, *see* Pl.'s Mem. in Support of Their Motion for Summ. J. at 12 & App. 1, and Defendants have either ignored those assertions or dismissed them as mere speculation. Thus, a genuine issue of material facts exists. Neither Party is entitled to summary judgment on this issue.

D. Statutory Damages

Plaintiff seeks not only rescission of her mortgage loan but also statutory damages for the underlying disclosure violations she alleges and for Defendants' failure to rescind her loan. Defendants argue that the limitation period for TILA claims established in 15 U.S.C. § 1640(e) bars Plaintiff's request as to all claims except rescission.

15 U.S.C. § 1640(e) provides that "any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation." With most TILA claims, the date the violation occurred is the date the credit transaction was consummated. *See Jenkins v. Mercantile Mortg. Co.*, 231 F. Supp. 2d 737, 745 (N.D. Ill. 2002). "Failure to bring an action for damages within [this] one-year limitation period bars the action." *Basham v. Finance America Corp.*, 583 F.2d 918, 927 (7th Cir. 1978). The one-year limitation period does not, however, apply to an action for rescission under 15 U.S.C. § 1635. *See Basham*, 583 F.2d at 928 n.17

(*citing Littlefield v. Walt Flanagan & Co.*, 498 F.2d 1133 (10th Cir. 1974)).

Thus, Plaintiff is not entitled to statutory damages for Defendants' failure to clearly disclose her payment schedule in accordance with TILA or for any of the other disclosure violations she alleges in her complaint. These violations occurred when Plaintiff's credit transaction was consummated on March 12, 2002. She did not file the instant Complaint until January 25, 2005, nearly two years after the statute of limitations had run. Plaintiff is, however, entitled to statutory damages for Defendants' failure to honor her notice of rescission.

This was the holding in *Brown v. Nationscredit Financial Services Corp.*, 349 F. Supp. 2d 1134 (N.D. Ill. 2005):

> [The plaintiff] is barred from bringing damages claims for the [TILA] violations . . . she claims occurred at the time she obtained the loan, as she did not bring those claims within the year after the loan was made. Her damage claim arising from defendants' failure to honor her notice of rescission is not time-barred because it was made within one year from the date of that particular violation.

Id. at 1138. *See also Jenkins*, 231 F. Supp. 2d at 745 (holding that claims *other than* rescission are subject to the one-year statute of limitations).

Accordingly, Plaintiff is entitled to statutory damages for Defendants' failure to honor her notice of rescission. 15 U.S.C. § 1640(a) sets out these damages.

V. CONCLUSION

For the foregoing reasons, Defendants' motion to strike is granted in part and denied as moot in part. Plaintiff's motion for summary judgment is granted in part and denied in part. Defendants' motion for partial summary judgment is denied. Plaintiff is entitled to rescission and statutory damages for Defendants' failure to rescind her mortgage loan.

Enter:

/s/ David H. Coar

David H. Coar

United States District Judge

Dated: **January 31, 2006**.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

SARAH HAMM,	) 05 C 0227
Plaintiff,	) Judge Der-Yeghiayan
v.	) Magistrate Judge Nolan
AMERIQUEST MORTGAGE COMPANY,	) **JURY DEMANDED**
Defendant.	)

I. PLAINTIFF'S RULE 56.1(b)(3) RESPONSE TO DEFENDANT'S STATEMENT OF UNCONTESTED MATERIAL FACTS

Pursuant to Local Rule 56.1(a)(3) of the Rules of the U.S. District Court for the Northern District of Illinois, Plaintiff Sarah Hamm submits the following Response to the Defendant's Statement of Uncontested Material Facts:

* * *

10. Plaintiff also signed the Adjustable Rate Note which states that, "I will pay principal and interest by making payments every month. I will make my monthly payments on the first day of each month beginning March 1, 2002. I will make these payments every month until I have paid all of the principal and any other charges . . . that I may owe under this note." Hamm dep. transcript, pp. 109-10, l. 12-10; p. 111, l. 5-8, Appendix A; Adjustable Rate Note, ¶ 3, Appendix H.

RESPONSE: Plaintiff objects to the allegations of this paragraph as immaterial but admits them.

11. The Adjustable Rate Rider signed and read by Plaintiff at closing states, "Interest Rate and Monthly Payment Changes." Hamm dep. transcript, pp. 113-14, l. 7-17, Appendix A; Interest Rate and Monthly Payment Changes Form, Appendix I.

RESPONSE: Plaintiff objects to the allegations of this paragraph as immaterial but admits them.

* * *

28. Plaintiff understood both prior to, and after, her loan closing that her payment would be due monthly. Hamm dep. transcript, p. 97, l. 6-8; p. 98, l. 6-19; p. 112, l. 15-23; p. 114, l. 14-17; p. 115, l. 9-18; pp. 122-23, l. 7-8; p. 125, l. 17-22; pp. 127-28, l. 22-14; p. 130, l. 8-19; p. 143, l. 4-13, Appendix A.

RESPONSE: Plaintiff objects to the allegations of this paragraph as immaterial but admits them.

29. Prior to entering into the loan transaction at issue in this case, Plaintiff's credit history included the payment of monthly credit card and car payments. Hamm dep. transcript, p. 58, l. 7-8; p. 59, l. 2-8; pp. 64-65, l. 21-7; pp. 74-75, l. 15-22, Appendix A.

RESPONSE: Plaintiff objects to the allegations of this paragraph as immaterial but admits them.

30. Plaintiff determined how much she could afford to pay for her loan based on her monthly

payment obligations. Hamm dep. transcript, pp. 79-80, l. 8-1, Appendix A.

RESPONSE: Plaintiff objects to the allegations of this paragraph as immaterial but admits them.

* * *

32. Plaintiff also previously held a position as a financial advisor with Met Life. Hamm dep. transcript, p. 23, l. 16-17, Appendix A.

RESPONSE: Plaintiff objects to the allegations of this paragraph as vague and immaterial but admits them.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

SHIRLEY JONES,	) 05 C 0432
Plaintiff,	) Judge David H. Coar
v.	) Magistrate Judge Schenkier
AMERIQUEST MORTGAGE COMPANY; AMERIQUEST MORTGAGE SECURITIES, INC. and AMC MORTGAGE SERVICES, INC.,	) **JURY DEMANDED**
Defendants.	)

PLAINTIFF'S RESPONSE TO "DEFENDANTS' STATEMENT OF ADDITIONAL UNCONTESTED MATERIAL FACTS"

* * *

4. One of the documents signed by Plaintiff was The Borrower(s) Acknowledgment at Closing, which states, "This document spells out the terms of your loan, including the amount of your monthly payments . . . Make sure you understand these terms and agree they are the ones you want before you sign any documents." Tab A, Jones dep. transcript, pp. 200, l. 2-17; Tab K, Borrower(s) Acknowledge at Closing Form within the Understanding Your Loan Form.

RESPONSE: Plaintiff admits the statements but states that they are immaterial in that (i) it is not a required element of TILA liability for a borrower to

have read this or any closing document (ii) it is not a defense to TILA liability that a borrower did not read this or every closing document; (iii) plaintiff's *subjective* understanding of when her payments would be due is not material to or determinative of whether there was a TILA disclosure violation, and (iv) TILA requires that the frequency or period of payments be fully and completely disclosed *on the TILA Disclosure Statement*.

5. Plaintiff signed the Important Notice To Borrowers that states, "(1) You . . . fully understand the terms of this loan transaction; and, (2) You have received a full and complete set of all the loan documents you have signed with this transaction, including a copy of this notice." Tab A, Jones dep. transcript, pp. 213, l. 9-17; Tab L, Important Notice to Borrowers.

RESPONSE: Plaintiff admits only that she signed the document and that it contains the quoted portion. Plaintiff *denies* that she received copies of any loan documents whatsoever at her March, 2002 closing; she testified that she received them weeks later, *via* FedEx. Further, plaintiff objects on the ground that the statement is immaterial in that: (i) it is *not* a required element of TILA liability that the borrower have read every document and (ii) it is *not* a defense to TILA liability that a borrower did not read every document and (iii) plaintiff's *subjective* understanding of the information contained in or omitted from TILA and other disclosures is not material to or

determinative of whether there was a TILA disclosure violation.

6. Plaintiff also signed the Adjustable Rate Note which states that, "I will pay principal and interest by making payments every month. I will make my monthly payments on the first day of each month beginning May 1, 2002. I will make these payments every month until I have paid all of the principal and any other charges . . . that I may owe under this notice." Tab A, Jones dep. transcript, pp. 190-91, l. 17-10 [sic]; p. 111, l. 5-8; Tab C, Adjustable Rate Note, ¶ 3(A).

RESPONSE: Plaintiff admits only that she signed the document and that it contains the quoted portion. Plaintiff objects to the statement in that it is immaterial in that (i) it is *not* a required element of TILA liability that the borrower have read this or other closing documents (ii) it is *not* a defense to TILA liability that a borrower did not read this or other documents; (iii) TILA requires that the frequency or period of payments be fully and completely disclosed *on the TILA Disclosure Statement*, and (iv) plaintiff's *subjective* understanding of the information contained in or omitted from TILA and other disclosures is not material to or determinative of whether there was a TILA disclosure violation.

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24. Plaintiff understood both prior to, and after, her loan closing that her payment would be due

monthly. Tab A, Jones dep. transcript, p. 137, 7-9 [sic], p. 147, l. 7-20; p. 194, l. 4-10; p. 219, l. 11-14.

RESPONSE: Plaintiff admits the statement but objects that it is immaterial in that (i) plaintiff's *subjective* understanding of when her payments are due is not material to or determinative of whether there was a TILA disclosure violation, and (ii) TILA requires that the frequency or period of payments be *fully and completely disclosed on the TILA Disclosure Statement*, regardless of the existence of any understanding or convention about when payments are generally due.

25. Prior to entering into the loan transaction at issue in this case, Plaintiff's credit history included the payment of monthly credit card, mortgage, and car payments. Tab A, Jones, dep. transcript, p. 44-45, l. 23-21; p. 46, l. 12-20; p. 53, l. 16-24; pp. 59-60, l. 10-19; pp. 67-68, 18-3 [sic]; pp. 73-74, l. 23-1 [sic].

RESPONSE: Plaintiff admits the statement but objects that it is immaterial in that (i) plaintiff's *subjective* understanding of when her payments are due is not material to or determinative of whether there was a TILA disclosure violation, and (ii) TILA requires that the frequency or period of payments be *fully and completely disclosed on the TILA Disclosure Statement*, regardless of the existence of any understanding or convention about when payments are generally due.

26. Plaintiff determined how much she could afford to pay for her loan based on her monthly payment obligations. Tab A, Jones dep. transcript, p. 101, l. 9-17, pp. 103-04, l. 11-6 [sic].

RESPONSE: Plaintiff admits the statement but objects that it is immaterial in that (i) plaintiff's *subjective* understanding of when her payments are due is not material to or determinative of whether there was a TILA disclosure violation, and (ii) TILA, requires that the frequency or period of payments be *fully and completely disclosed on the TILA Disclosure Statement*, regardless of the existence of an understanding or convention about when payments are generally due.

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